but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind. See *ibid.* It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway. See *Crawford-El, supra,* at 593; *Mt. Healthy, supra,* at 285–286.

When the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case in two ways. Like any other plaintiff charging official retaliatory action, the plaintiff in a retaliatory-prosecution claim must prove the elements of retaliatory animus as the cause of injury, and the defendant will have the same opportunity to respond to a prima facie case by showing that the action would have been taken anyway, independently of any retaliatory animus. What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge. Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive. This alone does not mean, of course, that a *Bivens* or §1983 plaintiff should be required to plead and prove no probable cause, but it does mean that litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful eviden-

tiary significance.[7]

The second respect in which a retaliatory-prosecution case is different also goes to the causation that a *Bivens* plaintiff must prove; the difference is that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or §1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute, *Imbler* v. *Pachtman*, 424 U. S. 409, 431 (1976).[8] Instead, the defendant will be a non-prosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory

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[7]Indeed, even though the Court of Appeals in this case held that plaintiffs do not have to show an absence of probable cause in order to make retaliatory-prosecution claims, it nevertheless acknowledged probable cause's significance in such suits. See 388 F. 3d 871, 881 (CADC 2004) ("Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. A *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus").

[8]An action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend. See *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 274–276 (1993) (no absolute immunity when prosecutor acts in administrative capacity); *Burns* v. *Reed*, 500 U. S. 478, 492–495 (1991) (absolute immunity does not attach when a prosecutor offers legal advice to the police regarding interrogation practices). In fact, Moore's complaint charged the prosecutor with acting in an investigative as well as in a prosecutorial capacity, see App. 45, but dismissal of the complaint as against the prosecutor was affirmed in 213 F. 3d 705, 710 (CADC 2000), and no claim against him is before us now.

inducement to prosecute.[9] The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another. See 213 F. 3d, at 710 ("In order to find that a defendant procured a prosecution, the plaintiff must establish 'a chain of causation' linking the defendant's actions with the initiation of criminal proceedings"); see also *Barts* v. *Joyner*, 865 F. 2d 1187, 1195 (CA11 1989) (plaintiff seeking damages incident to her criminal prosecution would have to show that the police, who allegedly acted in violation of law in securing her arrest, unduly pressured or deceived prosecutors); *Dellums* v. *Powell*, 566 F. 2d 167, 192–193 (CADC 1977) (where allegation of misconduct is directed at police, a malicious-prosecution claim cannot stand if the decision made by the prosecutor to bring criminal charges was independent of any pressure exerted by police); cf. *Smiddy* v. *Varney*, 665 F. 2d 261, 267 (CA9 1981) ("[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted").

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not

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[9] No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort. That is not part of Moore's complaint. See App. 33–34, 38–45. Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us.

necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 489–490 (1999); *United States* v. *Armstrong*, 517 U. S. 456, 464–466 (1996). And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal, see *Wayte* v. *United States*, 470 U. S. 598, 607–608 (1985).

Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.

It would be open to us, of course, to give no special prominence to an absence of probable cause in bridging the causal gap, and to address this distinct causation concern at a merely general level, leaving it to such pleading and proof as the circumstances allow. A prosecutor's disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption and closing the gap. So would evidence that a prosecutor was nothing but a rubber stamp for his investigative staff or the police. Cf. *Mt. Healthy*, 429 U. S., at 281–283. (evidence that the board of education, which formally decided not to rehire a teacher, was only nominally distinct from the school superintendent, who allegedly bore the retaliatory animus). In fact, though, these examples

are likely to be rare and consequently poor guides in structuring a cause of action. In most cases, for instance, it would be unrealistic to expect a prosecutor to reveal his mind even to the degree that this record discloses, with its reported statement by the prosecutor that he was not galvanized by the merits of the case, but sought the indictment against Moore because he wanted to attract the interest of a law firm looking for a tough trial lawyer.[10]

Accordingly, the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. True, it is not necessarily dispositive: showing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision. But a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision, see *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978) (emphasizing that "so long as the prosecutor has probable cause," the charging decision is

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[10] Some may suggest that we should structure a cause of action in the alternative, dispensing with a requirement to show no probable cause when a plaintiff has evidence of a direct admission by a prosecutor that, irrespective of probable cause, the prosecutor's sole purpose in initiating a criminal prosecution was to acquiesce to the inducements of other government agents, who themselves harbored retaliatory animus. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 469, n. 3 (1996) (leaving open the question "whether a [criminal] defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose'" (brackets in original)). But this would seem a little like proposing that retirement plans include the possibility of winning the lottery. Unambiguous admissions of successful inducement are likely to be rare, and hassles over the adequacy of admissions will be the predictable result, if any exemption to a no-probable-cause requirement is allowed.

generally discretionary), and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.

Our sense is that the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning. The issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense. See n. 7, *supra*. In this case, for example, Moore cannot succeed in the retaliation claim without showing that the Assistant United States Attorney was worse than just an unabashed careerist, and if he can show that the prosecutor had no probable cause, the claim of retaliation will have some vitality.

In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1495

MICHAEL HARTMAN, FRANK KORMANN, PIERCE McINTOSH, NORMAN ROBBINS, AND ROBERT EDWARDS, PETITIONERS *v.* WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 26, 2006]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

The Court of Appeals, reviewing the record so far made, determined that "[t]he evidence of retaliatory motive [came] close to the proverbial smoking gun." 388 F. 3d 871, 884 (CADC 2004). The record also indicated that the postal inspectors engaged in "unusual prodding," strenuously urging a reluctant U. S. Attorney's Office to press charges against Moore. *Ibid.* Following Circuit precedent, the Court of Appeals held that "once a plaintiff shows [conduct sheltered by the First Amendment] to have been a motivating factor in the decision to press charges," the burden shifts to the defending officials to show that the case would have been pursued anyway. *Id.*, at 878.

Recognizing that this case is now directed against the instigating postal inspectors alone, not the prosecutor, I would not assign to the plaintiff the burden of pleading and proving the absence of probable cause for the prosecution. Instead, in agreement with the Court of Appeals, I would assign to the postal inspectors who urged the prosecution the burden of showing that, had there been no retaliatory motive and importuning, the U. S. Attorney's Office nonetheless would have pursued the case.

Under the Court's proof burden allocation, which saddles plaintiff—the alleged victim—with the burden to plead and prove lack of probable cause, only *entirely* "baseless prosecutions" would be checked. *Id.*, at 879. So long as the retaliators present evidence barely sufficient to establish probable cause and persuade a prosecutor to act on their thin information, they could accomplish their mission cost free. Their victim, on the other hand, would incur not only the costs entailed in mounting a defense, he likely would sustain a reputational loss as well, and neither loss would be compensable under federal law. Under the D. C. Circuit's more speech-protective formulation, "[a] *Bivens* [v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),] recovery remains possible . . . in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the [investigation and ensuing] prosecution would not have occurred but for the [defending] officials' retaliatory animus." *Id.*, at 881. That such situations "are likely to be rare," it seems to me, does not warrant "structuring a cause of action," *ante*, at 14, that precludes relief when they do arise.

For reasons fully developed in the D. C. Circuit's opinion, I conclude that, in full accord with this Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977), the Court of Appeals' decision strikes the proper balance. I would, therefore, affirm the Circuit's judgment.